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No. 05-

IN THE

Supreme Court of the United States

CHRISTINE LEMP, Individually, and as Representative of the Estate of Captain James Lemp, Deceased and as Next Friend of Matthew Lemp and Sarah Lemp, Minor Children,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the *Feres* doctrine preclude non-combat related medical malpractice claims by servicemen against military doctors? *See generally Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed 152 (1950).

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Appendix B — Order Of The United States District Court For The Western District Of Texas, Austin Division Dated February 28, 2005 ..... 2a

Petitioners Christine Lemp, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States District Court for the Western District of Texas, Austin Division and the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit (Pet. App. A), dated August 8, 2005, is not published. The district court's order granting respondent's motion to dismiss (Pet. App. B), dated February 28, 2005, is unpublished.

STATEMENT OF JURISDICTION

The order of the court of appeals was entered on August 8, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The relevant statutory provision in this case is 28 U.S.C. § 1346(b).

STATEMENT

1. This case was originally commenced and prosecuted against the United States of America pursuant to, and in compliance with 28 U.S.C. §§ 2671-2680, commonly referred to as the "Federal Tort Claims Act." Liability of the United States is predicated specifically on 28 U.S.C. §§ 1346(b)(1) and 2674 because the personal injuries and resulting damages of which complaint is made were proximately caused by the

negligence, wrongful acts and/or omissions of employees of the United States of America at General Leonard Wood Army Community Hospital, while acting within the scope of their office or employment, under circumstances where the United States of America, if a private person, would be liable to the Plaintiffs in the same manner and to the same extent as a private individual. On January 27, 2005, Respondent sought dismissal of the complaint for failure to state a claim. Although Petitioner fought the dismissal on grounds that the *Feres* doctrine should not apply to medical malpractice claims which arise outside of the combat arena, the District Court granted Respondent's motion, and an Order of Dismissal and a Final Judgment was entered on February 27, 2005. A Notice of Appeal was filed on April 7, 2005 and an unopposed Motion for Summary Affirmance was filed on July 21, 2005. An Order granting the motion was signed on August 8, 2005.

2. By way of background, this is a Federal Tort Claims Action for monetary damages arising out of the death of Captain James Lemp which was caused by negligent medical care. Captain James Lemp was called to active duty on or about January 27, 2003 and sent to Ft. Leonard Wood in Missouri to an officer's training camp.

3. On or about March 2, 2003, Captain James Lemp developed an acute severe headache, vomiting, double vision, dizziness, numbness and tingling in his arms, all indicative of a neurological abnormality. He went to the emergency room and was given an antiemetic with little effect. The emergency room physician, David Coffin, M.D., Cpt., MC, ordered a CT scan of Captain Lemp's head. The CT scan was interpreted by Cpt. Coffin as negative. Full neurological workup and neurological consultation were not obtained.

4. Captain Lemp was then admitted to the hospital with a diagnosis of vomiting and gastroenteritis, a diagnosis that did not fit Captain Lemp's symptoms of double vision, numbness and tingling in his upper arms, dizziness and associated nausea, vomiting and headache. Following admission, Brandon Peltier, D.O., Cpt. MC, did not order a spinal tap to rule out meningitis or intracranial hemorrhage. Nor was an MRI obtained after the CT scan was interpreted as negative. Yet, his neurological symptoms remained. During the evening, Captain Lemp's blood pressure became elevated and continued to remain elevated, causing increased intracranial pressure which led to a stroke.

5. On or about the evening of March 3, 2003, the nursing staff, including Homer Morrow, R.N., failed to adequately monitor or report Captain Lemp's elevated blood pressures which continued to rise. Captain Lemp began to exhibit symptoms of seizure activity, including shaking, loud groaning and posturing. Despite the fact that Captain Lemp's neurological condition was unstable and clearly deteriorating, Dr. Franklin Hauger, Maj. MC, covering the family practice service, failed to protect his airway with ongoing monitoring, intubation and mechanical ventilation.

6. The nursing staff, including Homer Morrow, R.N. failed to monitor Captain Lemp approximately after he had developed altered mentation and seizure disorder which resulted in a compromised airway, hypoxia, aspiration of vomitus, respiratory arrest and profound bradycardia resulting in cerebral anoxia. A code was called and Captain Lemp was resuscitated. He was then transferred to St. John's Hospital after being placed on a ventilator. Captain Lemp suffered a vertebral artery dissection, resulting in brain stem infarct, and subsequent development of brain edema and, ultimately, death.

REASON FOR GRANTING THE PETITION

In 1950, the Supreme Court created a doctrine barring recovery by military personnel who suffer injuries arising from activities "incident to" their military service.[1] As support for this unquestionably harsh, judicially created doctrine, the Supreme Court emphasized three important "public policy" justifications: (1) the "distinctly federal" relationship between the United States and its military personnel; (2) the presence of an alternative source of compensation; and (3) the fear of disrupting the military disciplinary structure.[2] In reaching its decision, the Court in *Feres* reasoned that no theory of private liability was "even remotely analogous" to negligence actions brought against superior officers. Thus, the Court concluded, in "the absence of express congressional command," Congress did not intend to waive immunity for injuries arising from service in the military.[3] Moreover, the

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1. *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed 152 (1950); *United States v. Shearer*, 473 U.S. 52, 105 S. Ct. 3039, L. E. 2d 38 (1985); *United States v. Johnson*, 481 U.S. 681, 686-92, 107 S. Ct. 2063, 2066-70, 95 L. Ed. 2d 648 (1987) (affirming the core holding of *Feres*). The *Feres* decision involved three actions against the United States. In the *Feres* case the executrix of Feres' estate brought a wrongful death action alleging that Feres was quartered negligently in barracks with a defective heating plant. *Feres*, 340 U.S. at 136-37, 71 S. Ct. at 155. The plaintiffs in the other two actions, *Jefferson v. United States* and *United States v. Griggs*, alleged medical malpractice on the part of military physicians. *Id* at 137, 71 S. Ct. at 155.

2. *Stencel Aero Eng. Corp. v. United States*, 431 U.S. 666, 671, 671-72, 97 S. Ct. 2054, 2057-58, 52 L. Ed. 2d 665 (1977).

3. *Feres* at 340 U.S. at 141, 146, 71 S. Ct. 157, 159 L. Ed 152.

Court added that in the absence of such an express waiver, "a district court has no jurisdiction to entertain a suit against the United States" for injuries military personnel incur during activities incident to military service.[4]

The *Feres* doctrine applies to injuries sustained during activities "incident to military service." In order to determine whether an activity is incident to military service, the Courts generally consider (1) the place where the negligent act occurred; (2) the duty status of the plaintiff when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a service member; and (4) the nature of the plaintiff's activities at the time the negligent act occurred.[5] In this case, the lower courts ignored both the absence of a combat-related causal link, as well as, the absence of any public policy factors, e.g. the potential disruption to the military disciplinary structure, opting instead to continue the erroneous expansion of the doctrine to immunize doctors who negligently treat military personnel in a non-combat related context.

As noted by Justice Scalia throughout his dissent in *United States v. Johnson*, this sort of unnecessary expansion of the doctrine based on the notable absence of congressional intent, makes this case an ideal vehicle to decide whether, in the absence of harm to the military disciplinary structure and in the absence of a combat-related injury and/or treatment,

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4. *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1156 (5th Cir. 1981).

5. *Bon v. United States*, 802 F.2d 1092, 1094 (9th Cir. 1986) (citing *Johnson v. United States*, 704 F.2d 1431, 1436-41 (9th Cir. 1983)).

the *Feres* doctrine should preclude Petitioners' medical malpractice claims. *Johnson*, 481 U.S. at 699. In other words, this case presents an opportunity to stop the unnecessary expansion of the *Feres* doctrine, by overruling it with respect to non-combat related medical malpractice claims.

In this case, Captain Lemp, although an active duty officer, was not harmed during a military operation or during the performance of any military-related function. Likewise, the medical treatment received by Captain Lemp was not the product of a combat-related injury or the result of other military activity. Instead, Captain Lemp simply went to the doctor because he was complaining of a headache. This scenario is so far removed from the combat environment envisioned by *Feres*, that it hardly even nibbles at the edges of any of the public policy justifications or rationalizations that led to the creation of the doctrine in the first place.

Similarly, the conduct which gave rise to the lawsuit in the first place, e.g. the failure to timely and properly evaluate and/or monitor Captain Lemp or the failure to properly diagnose and/or treat Captain Lemp, hardly invokes the "threat to military discipline" rationalization that was criticized by Justice Scalia in *Johnson*. *Id.* at 699-670. Indeed, holding a military doctor liable for failing to abide by universal standards of medical care (not military policy), will not invade the sanctity of military decision making, because the military was not involved and Captain Lemp was not injured while engaging in any sort of military activity.

As such, because this case does not involve a soldier who was negligently treated by a paramedic in the battlefield, but rather a soldier who simply went to the functional equivalent of an on-base infirmary, complaining of a

headache, *Feres* should not apply. Moreover, *Feres* should not apply because it was not intended to insulate negligent doctors, but rather to preserve the integrity of the battlefield and the military structure.

Finally, the importance of this issue, and why it needs to be addressed by the Court, is highlighted by the fact that Justice Scalia, Justice Brennan, Justice Marshall and Justice Stevens have already discussed in detail why the doctrine, in its current state, "is now sustained only by . . . disembodied estimations of what Congress *must* (despite what it enacted) have intended." *Id.* at 695. (emphasis in original). Given the judicial scrutiny this issue has received in the past, and the prevalent use of "unauthorized rationalization(s) gone wrong" to improperly immunize the government, the time to disrupt well-settled, albeit erroneous *stare decisis*, is now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 8, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No: 05-50510
1:04cv767 LY

CHRISTINE LEMP, Individually, and as Representative of the Estate of Captain James Lemp, Deceased and as Next Friend of Matthew Lemp and Sarah Lemp, Minor Children

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

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Before JOLLY, DAVIS, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's unopposed motion for summary affirmance is GRANTED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION DATED FEBRUARY 28, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-04-767-LY

CHRISTINA LEMP, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CAPTAIN JAMES LEMP, DECEASED AND AS NEXT FRIEND OF MATTHEW LEMP AND SARAH LEMP, MINOR CHILDREN,

PLAINTIFFS,

V.

UNITED STATES OF AMERICA,

DEFENDANT.

ORDER

Before the Court are Defendant United States of America's Motion to Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure filed January 27, 2005 (Doc. #2); and Plaintiffs' Response to Defendant's Motion to Dismiss filed February 24, 2005 (Doc. #5). Having considered the motion and response, the Court is of the opinion that the motion should be granted based upon the reasoning to follow.

Appendix B

In its motion, Defendant asserts that Plaintiffs' claims are barred by the *Feres* doctrine[1] based on the fact that the decedent, Captain James Lemp, was an Army officer at the time the alleged medical negligence occurred for which Plaintiffs seek judicial relief. The alleged medical negligence took place in a military hospital where Captain Lemp went for treatment while on active duty.

The *Feres* doctrine applies if the serviceman's injury was incident to military service, *See United States v. Johnson,* 481 U.S. 681, 691 (1987). A court must examine the totality of the circumstances to determine whether a serviceman's injury was incident to military service. *See Parker v. United States,* 611 F.2d 1007, 1013 (5th Cir. 1980), including consideration of: (1) the serviceman's duty status; (2) the site of his injury; and (3) the activity he was performing. *Id.* at 1013-15. Court's consider the serviceman's duty status as the most important factor because it indicates the nature of the nexus between the serviceman and the Government at the time of injury. *See Adams v. United States,* 728 F.2d 736, 739 (5th Cir. 1984). Indeed, duty status may be dispositive; *Feres* applies to a serviceman who is on active duty and has active status. *See Jones v. United States,* 729 F.2d 326, 328 (5th Cir. 1984); *Adams,* 728 F.2d at 739; *Schoemer v. United States* 59 F.3d 26, 28-9 (5th Cir. 1995).

Plaintiffs concede in Paragraph 9.1 of their Complaint that their claims are barred by *Feres* doctrine, but seek to challenge that decision based upon Justice Scalia's dissent in *Johnson.* 481 U.S. at 692-703. Case-law precedent

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1. *Feres v. United States,* 340 U.S. 135 (1950).

following *Feres* and *Johnson*, however, continues to bar recovery by active military personnel who suffer injuries arising "incident to" their military service. *See, e.g. Schoemer*, 59 F.3d 28-9; *Hayes v. United States*, 44 F.3d 377, 378-9 (5th Cir. 1995). This Court is bound by such precedent and shall follow it. For this reason, Plaintiffs' claims shall be dismissed.

Plaintiffs request the opportunity to conduct discovery on this issue of whether the alleged negligence was incident to Captain Lemp's military service. The Court's review of the complaint, answer, and response to Defendant's motion, however, clearly reveal that Captain Lemp was on active duty with the military at the time he received the alleged treatment at issue in this cause. Therefore, this Court finds that discovery is unwarranted, and the Court declines to allow Plaintiffs' request.

IT IS THEREFORE ORDERED that Defendant United States of America's Motion to Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure filed January 27, 2005 (Doc, #2) is **GRANTED.** Plaintiffs' claims are **DISMISSED WITH PREJUDICE.**

SIGNED this 28th day of February, 2005.

s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE